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Supreme Court of the United States.

OCTOBER TERM, 1947.

No. 332

THE COCA-COLA COMPANY, *Petitioner*,

v.

SNOW CREST BEVERAGES, INC., *Respondent*.

PETITION OF THE COCA-COLA COMPANY FOR THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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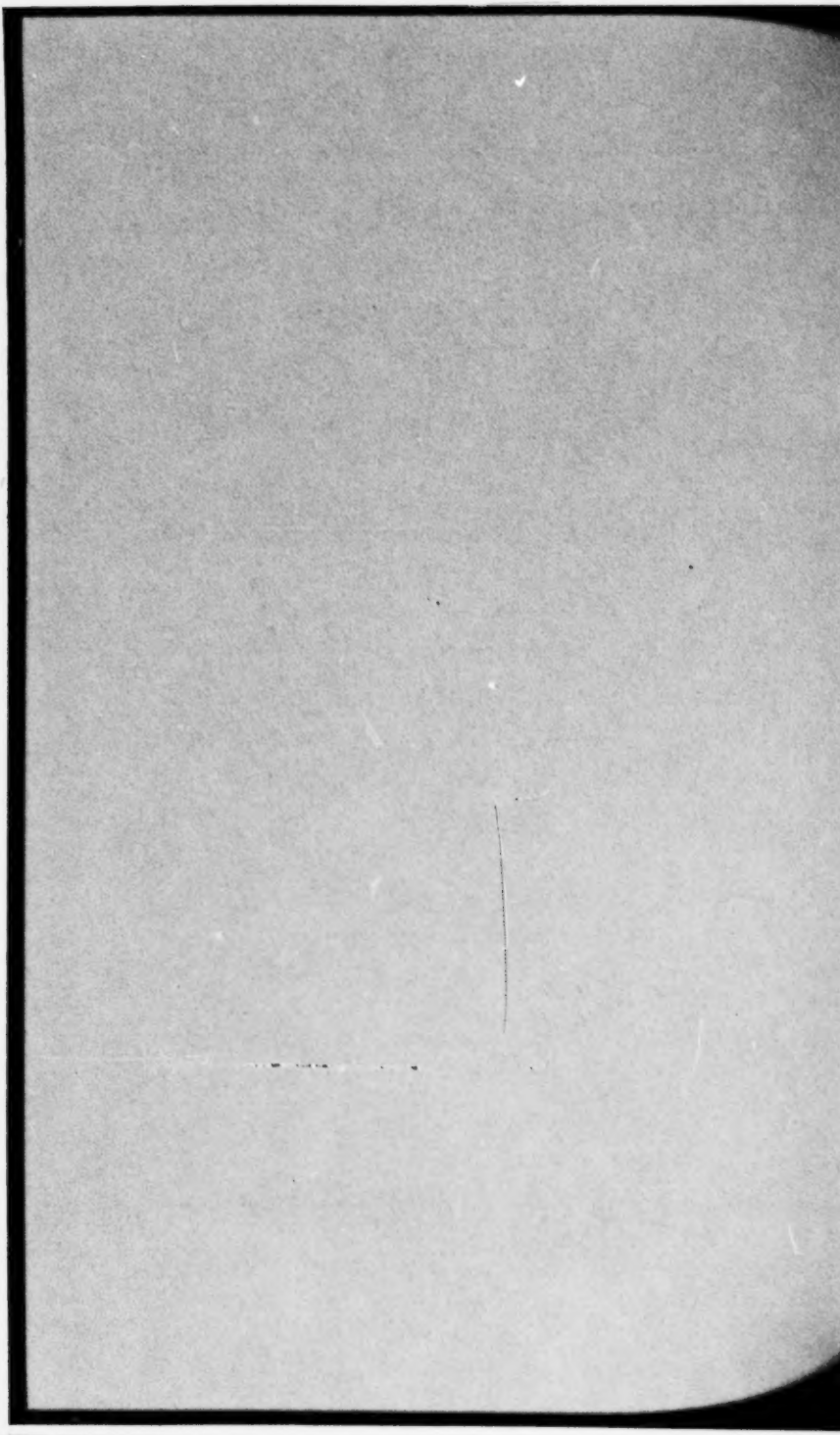

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Supreme Court of the United States.

OCTOBER TERM, 1947.

THE COCA-COLA COMPANY, *Petitioner*,

v.

SNOW CREST BEVERAGES, INC., *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Coca-Cola Company, respectfully prays that the writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered on June 10, 1947, affirming the judgment of the District Court of the United States for the District of Massachusetts entered on March 25, 1946, dismissing the complaint. The opinion of the District Court is reported in 64 F. Supp. 980. The opinion of the Circuit Court of Appeals is reported in 162 F. (2d) 280, and also appears on pages 494 to 504 of the Record.

Jurisdiction.

The Circuit Court of Appeals entered its judgment on June 10, 1947, pursuant to an opinion rendered on the same day. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. Sec. 347 (a)); and under the Act of July 5, 1946 (15 U.S.C. Sec. 1122).

Summary Statement of Matter Involved.

This action was brought to enjoin infringement of the petitioner's registered trade-mark "Coca-Cola" by respondent's colorable imitation "Polar Cola" [1] applied to competing goods, the use of which resulted in the widespread passing off of Polar Cola on calls for Coca-Cola. The passing off was caused by the use of the colorable imitation and was suggested to dealers by respondent's imitation of petitioner's registered trade-mark, imitation of petitioner's product in color, appearance and taste, imitation of petitioner's advertising color scheme, imitation of petitioner's script form of writing its trade-mark, and imitation of petitioner's trade slogan "Delicious and Refreshing."

Petitioner, The Coca-Cola Company, is a Delaware corporation and owns the trade-mark "Coca-Cola." For more than sixty years petitioner and its predecessors have manufactured and sold in interstate commerce a soft drink syrup and beverage under the trade-mark "Coca-Cola."

Respondent, Snow Crest Beverages, Inc., is a Massachusetts corporation which manufactures and sells a soft drink under the name "Polar Cola" in competition with Coca-Cola.

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[1] Generally pronounced "Pola Cola." See Webster's New International Dictionary (2d ed.), p. *l*, § 212, of the section "A Guide to Pronunciation."

During recent years the respondent's trade has been carried on almost exclusively in bars and taverns. Eighty-two bars and taverns in the Boston area were investigated by petitioner, with this result: *Forty-seven bars and taverns passed off Polar Cola 671 times on 805 orders for Coca-Cola.* Thirty-three were found not to have Polar Cola for sale. *Two* others were found to have Polar Cola but they did not pass it off for Coca-Cola on the one occasion each was visited.

In the District Court, where its complaint was dismissed and all relief denied, and in the Circuit Court of Appeals, where the judgment was affirmed, petitioner contended that—

1. "Polar Cola" infringes "Coca-Cola" as a matter of law.
2. "Polar Cola" infringes "Coca-Cola" and its use has actually resulted in widespread passing off.
3. Respondent's use of "Polar Cola" constitutes unfair competition and should be enjoined.

Questions Presented.

1. Is not "Polar Cola," [2] because of *phonetic similarity* to the registered trade-mark "Coca-Cola," as a matter of law, a colorable imitation of "Coca-Cola" within the meaning of the Federal trade-mark statutes when the mark is used on competing goods?

2. Since the scope of the Federal trade-mark statutes is nation-wide, may a Court nullify the protection granted a trade-mark registered thereunder by holding that "Polar Cola" does not infringe "Coca-Cola" (First Circuit) when another Circuit Court of Appeals has held that "Apola Cola" does infringe "Coca-Cola" (Fourth Circuit) and

[2] Pronounced "Pola Cola." See page 2, *supra*.

a United States District Court has held that "Polo-Kola" infringes "Coca-Cola" (Sixth Circuit), the consequence of which is that "Polar Cola" may be used in Boston, but not in Richmond or Detroit?

Reasons for Granting Certiorari.

The decision of the Circuit Court of Appeals for the First Circuit is in conflict with the decisions of Federal Courts in other circuits.

Some of the cases involving infringements of the trade-mark "Coca-Cola" and in conflict with the decision in this case are cited in the margin.[3]

These cases show that in the Fourth Circuit "Lola Kola," "Apola Cola," "Taka-Kola" and "Takola" are colorable imitations of "Coca-Cola"; in the Sixth Circuit Court "Polo-Kola," "Gay-Ola" and "Fletcher's Coca Cola" are colorable imitations of "Coca-Cola"; in the

[3] Coca-Cola Company v. Gay-Ola Co. (C.C.A. 6), 200 F. 720—"Gay-Ola."

Coca-Cola Company v. Nashville Syrup Co. (C.C.A. 6), 215 F. 527—"Fletcher's Coca Cola."

Coca-Cola Company v. Old Dominion Beverage Corp. (C.C.A. 4), 271 F. 600—"Taka-Kola."

Coca-Cola Company v. Old Dominion Beverage Corp. (E.D. Va.) No. 39, Equity, 1922.

Coca-Cola Company v. Chero-Cola Co. (C.A.D.C.), 273 F. 755—"Chero-Cola."

Dixi-Cola Laboratories, Inc., v. Coca-Cola Company (C.C.A. 4), 117 F. (2d) 352—(deciding that the "mere use" of the name "Dixi-Cola" is not an infringement of the trade-mark "Coca-Cola" and that the marks "Lola Kola" and "Apola Cola" do infringe the trade-mark "Coca-Cola"). See also same case at 155 F. (2d) 59.

Cleo Syrup Corp. v. Coca-Cola Company (C.C.A. 8), 139 F. (2d) 416—"Cleo-Cola."

Coca-Cola Company v. Belinsky (E.D. Mich.), 57 F. Supp. 120—"Polo-Kola."

Eighth Circuit Cleo-Cola is a colorable imitation of "Coca-Cola"; and in the District of Columbia "Chero-Cola" is a colorable imitation of "Coca-Cola"; and this Court, speaking through Mr. Justice Holmes, affirmed a decree enjoining "Koke" as a colorable imitation of "Coca-Cola"; but in the face of all this, the Court below has held that "Polar Cola" is *not* a colorable imitation of "Coca-Cola."

Thus the decision in this case has created a situation in which marks which have been or would be enjoined in several of the circuits of the United States as being colorable imitations of the trade-mark "Coca-Cola" would not be colorable imitations in the First Circuit and could be used there with impunity.

Trade-marks, like patents, require uniform adjudication throughout the circuits, and petitions for certiorari in both types of cases are on a parity.[4] This Court has frequently resolved conflicting decisions in the Circuit Courts involving the validity of patents;[5] the infringement of patents where validity is conceded;[6] and acts of unfair competition.[7] This Court has also granted certiorari to achieve uniformity of result in fixing substantive rights under the Federal Laws.[8]

The decision of the Court below, if allowed to stand, will narrow the scope of protection of registered trade-marks, in conflict with the applicable decisions of this Court and in conflict with the express intent of Congress to broaden such protection, as is made manifest in the legislative his-

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[4] *Street & Smith* v. *Atlas Mfg. Co.*, 231 U.S. 348; 15 U.S.C. Sec. 1122.

[5] *Dow Chemical Co.* v. *Halliburton Oil Well Cementing Co.*, 324 U.S. 320; *Katzinger* v. *Chicago Metallic Mfg. Co.*, 329 U.S. 394.

[6] *Sanitary Refrigerator Co.* v. *Winters*, 280 U.S. 30.

[7] *Fashion Guild* v. *Federal Trade Commission*, 312 U.S. 457.

[8] *Klaxon Co.* v. *Stentor Mfg. Co. Inc.*, 313 U.S. 487; *Warner* v. *New Orleans*, 167 U.S. 467.

tory and context of the Trade-Mark Act of 1946 (Lanham Act).

The decision of the Court below, if allowed to stand, will reduce the law of infringement and unfair competition to a plausible but ineffective theory, and will become a precedent for court sanction of confusion and deception of the public in conflict with the applicable decisions of this Court and with the overwhelming weight of authority and against the express intent of the Federal Trade-Mark statutes.

Because of the sharp conflict between the decision of the Court below and the overwhelming weight of authority, and particularly in the light of recent Congressional action on the subject of trade-marks and unfair competition, the subject-matter of this petition is of public, economic and industrial importance.

WHEREFORE your petitioner respectfully prays that this petition for the writ of certiorari be granted.

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BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the District Court is reported in 64 F. Supp. 980. The opinion of the Circuit Court of Appeals is reported in 162 F. (2d) 280, and also appears on pages 494 to 504 of the Record.

Jurisdiction.

The judgment was rendered in a civil action brought under the trade-mark statutes of the United States to determine the issues of infringement of a trade-mark registered under the Trade-Mark Act of 1905 (15 U.S.C. 81 *et seq.* and unfair competition. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. 347 (a)); and under the Act of July 5, 1946 (15 U.S.C. 1122).

Specification of Errors.

The Circuit Court of Appeals for the First Circuit erred—

1. In failing to conclude that "Polar Cola," as a matter of law, is a colorable imitation of the registered trade-mark "Coca-Cola."

2. In holding that "Polar Cola" is not a colorable imitation of the registered trade-mark "Coca-Cola," thereby creating a conflict between its decision and decisions in other circuits.

3. In failing to hold that the use of "Polar Cola," particularly under the proved circumstances surrounding its use and the resulting passing off, constitutes infringement and unfair competition.

4. In failing to reverse the decree of the District Court directing entry of judgment dismissing the complaint.

Statement of the Case.

Petitioner seeks a review of the decision of the Circuit Court of Appeals for the First Circuit holding that "Polar Cola" [1] does not infringe "Coca-Cola."

A brief history of respondent's adoption and use of "Polar Cola" follows:

1. In 1935 it produced a soft drink imitating petitioner's in appearance, taste and color. The color of both products is obtained by the use of caramel, which has no food value, is purely decorative and does not affect the flavor of the beverage (R. 283, 441).

2. It selected as a name for its product the word "Sno," an abridged spelling of "Snow," the prefix of its well-advertised mark "Snow Crest," and combined it with the word "Kola," the suffix of petitioner's trade-mark except for the substitution of "K" for "C" in the spelling (R. 381). The name thus formed, "Sno Kola," was later changed in spelling to "Sno Cola" (Exhibit D, R. 313; Finding 8, R. 15).

3. The mark "Sno Kola," later "Sno Cola," was displayed in white block letters on a small triangular red field in a silvery white background (Exhibit 1, R. 95).

4. In 1937 (while not discontinuing its sales under the mark "Sno Cola") respondent adopted another name for the same product by dropping the word "Cub" from its well-advertised mark "Polar Cub" and joining the word "Polar" to "Kola" (R. 15). The spelling was later changed to "Polar Cola" (R. 15, 458, 459, 468).

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[1] Generally pronounced "Pola Cola." See Webster's New International Dictionary (2d ed.), p. *l*, § 212, of the section "A Guide to Pronunciation."

5. In 1937, or earlier, respondent used on its "Polar Cola" and "Sno Cola" labels for its 12-ounce bottles the words "Double Size," as to which the trial Court found:

> " 'Double Size' was a description which, in view of the wide market for Coca-Cola, the normal buyer of soft drinks would interpret as 'double the size of a Coca-Cola bottle' " (Finding 9, R. 16).

6. In 1937, or earlier, respondent used on its "Polar Cola" labels an imitation of petitioner's well-known slogan: "Delicious and Refreshing."

7. Respondent's original labels for "Polar Cola" and "Sno Cola" displayed the marks in *white block letters* on a *blue* background; but about 1940 it changed its color scheme to white block letters on a red background (Exhibit D, R. 313; Exhibits 30-51, R. 48-51, incl.). Petitioner has always displayed its trade-mark "Coca-Cola" in a color combination of *red* and *white* (R. 437).

8. At about the same time, respondent substituted for the block letters a style of writing "Polar Cola" which the trial Court said "approaches script" (Exhibit D, R. 313; Exhibits 30-51, R. 47-52, incl.; Finding 11, R. 16). Petitioner has always written its trade-mark "Coca-Cola" *in script* (R. 433). The obvious reason for respondent's making these changes was to approximate "Coca-Cola" at every point.

9. Respondent did not attempt to justify its progressive approach to petitioner's distinguishing features, but attempted to excuse its use of "Cola" in "Sno Cola" and "Polar Cola" on the ground it is a generic word common to the trade. *However, respondent does not make use of the word in a generic sense, but as an integral part of its mark* (Finding 9, R. 15, 459, 460).

10. In arriving at its final choice of a mark to use on its product, respondent experimented with three marks—"Sno Cola," "Polar Cola" and "Cubola" (Findings 8, 9; R. 15, 455, 458), and at last selected and used exclusively, until this action was brought, a name the prefix of which contains both the letters "o" and "a" found in the prefix of petitioner's trade-mark "Coca-Cola," and the suffix of which is an exact copy of the suffix of petitioner's trade-mark "Coca-Cola."

The result of respondent's conduct was the widespread passing off of "Polar Cola" as and for "Coca-Cola."

Argument.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS ERRONEOUS AND IS IN CONFLICT WITH NUMEROUS DECISIONS IN OTHER CIRCUITS.

A. The Statutes.

This action was brought under the Trade-Mark Act of 1905,[2] which, on July 5, 1947, was supplanted by the Trade-Mark Act of 1946.[3] Under each of these Acts a right of action is afforded the owner of a registered mark to suppress the use of a colorable imitation.[4]

"Colorable imitation" is defined in the Act of 1946 as follows:[5]

> "The term 'colorable imitation' includes any mark which so resembles a registered mark as to be likely to cause confusion or mistake or to deceive purchasers."

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[2] 15 U.S.C. 81 *et seq.*
[3] 15 U.S.C. 1051 *et seq.*
[4] 15 U.S.C. 96 and 1114.
[5] 15 U.S.C. 1127.

Section 47 (b) of the Act of 1946 [6] provides, among other things, that in any case in which an appeal is pending before any United States Circuit Court of Appeals or the United States Supreme Court at the effective date of the Act (July 5, 1947) the Court, if it be of the opinion that the provisions of the Act are applicable to the subject-matter of the appeal, may apply such provision or may remand the case to the District Court for the taking of additional evidence or a new trial or for reconsideration of the decision on the record as made, as the Appellate Court may deem proper.

B. The Law of Infringement.

The purpose underlying the protection of trade-marks, as was stated by the Congressional Committees in reporting favorably the Trade-Mark Act of 1946,[7] is twofold: "One is to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats. This is the well-established rule of law protecting both the public and the trade-mark owner."

As was said in a recent case, "The protection of trade-marks is the law's recognition of the psychological function of symbols." [8]

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[6] Note following 15 U.S.C. 1051.

[7] House Report No. 219, 79th Congress, Second Session; Senate Report No. 1333, 79th Congress, Second Session.

[8] *Mishawaka Rubber & Woolen Mfg. Co.* v. *Kresge Co.*, 316 U.S. 203.

And Mr. Justice Holmes, in an earlier case, nicely evaluated the situation when he stated that a trade-mark deals with "a delicate matter that . . . easily is destroyed, and therefore should be protected with corresponding care." [9] "It stakes the reputation of the [owner of the mark] upon the character of the goods." [10]

"[Trade-marks] constitute valuable business assets in the nature of good will . . ."; [11] and a trade-mark "gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his." [12] While the owner of a trade-mark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it,[13] he is secured in his property represented by the good will of his business, and he is protected against trade piracy and swindling. Property, as applied to trade-marks, is "an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith." [14]

In connection with passage of the new Trade-Mark Act, the Committees of Congress expressed in clear and unequivocal language the underlying reasons for protecting trade-marks. The Reports of both the House and the Senate Committees state:

> "Trade-marks, indeed, are the essence of competition, because they make possible a choice between competing articles by enabling the buyer to distinguish one from the other. Trade-marks encourage the main-

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[9] *A. Bourjois & Co.* v. *Katzel*, 260 U.S. 689, 692.

[10] *Bourjois* case, *supra*; *Menendez* v. *Holt*, 128 U.S. 514.

[11] *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 217.

[12] *Prestonettes, Inc.*, v. *Coty*, 264 U.S. 359, 368.

[13] *United Drug Co.* v. *Rectanus Co.*, 248 U.S. 90, 97-98.

[14] *Du Pont Powder Co.* v. *Masland*, 244 U.S. 100, 102.

> tenance of quality by securing to the producer the benefit of the good reputation which excellence creates. To protect trade-marks, therefore, is to protect the public from deceit, to foster fair competition and to secure to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not." [15]

The protection to registered marks afforded under the trade-mark statutes is not limited to exact copies or reproductions. The use of "colorable imitations" of registered marks is also prohibited.[16] And in determining what constitutes a colorable imitation, regard must be had to the nature of the mark and its secondary, as distinguished from its primary, significance. As was said by this Court, speaking through Mr. Justice Hughes, in the *Davids* case, *supra,* in which "C. I. Davids" was held to be a colorable imitation of "Davids":

> "The distinction between permissible and prohibited uses may be a difficult one to draw in particular cases but it must be drawn in order to give effect to the act of Congress. That the distinction may readily be observed in practice is apparent. In this case, for instance, if the defendants had so chosen, they could have adopted a distinct mark of their own, which would have served to designate their inks and completely to distinguish them from those of the complainant."

A man imitates and approximates, not for the purpose of distinguishing, but for the purpose of *not* distinguish-

[15] House Report No. 219, 79th Congress, Second Session; Senate Report No. 1333, 79th Congress, Second Session.

[16] *Thaddeus Davids Co.* v. *Davids Mfg. Co.,* 233 U.S. 461, 469, 471.

ing. When he imitates the marks-in-trade of a successful rival, he does not do so to avoid confusion, but to bring about confusion. When he progressively and deliberately approximates another's distinguishing features, it must be presumed that he intended to bring about confusion, and, even in the absence of proof of confusion, deception and passing off, he will not be heard to say: "I tried to commit a fraud and failed." But when actual confusion, deception and passing off are proved, the imitator is presumed to have *intended* the consequences of his acts.[17]

The central relevant fact in this case is that the only sign, symbol, act or word which is relied on in the market place to identify soft drinks is the spoken order given by customers. The public generally calls for the product by *name*. The test of infringement, therefore, is in no sense and in no degree a visual one. It is wholly a *phonetic test;* and the phonetic similarity between "Polar Cola" and "Coca-Cola" is striking. Respondent's step-by-step imitation of petitioner's soft drink, color scheme, script form of writing and trade slogan was not so much for the purpose of *directly* confusing the public as it was for suggesting to dealers, subtly but effectively, that the product could be passed off as and for Coca-Cola. The product actually *was* passed off on a large scale and the result was widespread deception of the public.

"Polar Cola" is a colorable imitation of "Coca-Cola," as are "Cleo Cola,"[18] "Taka-Kola" and "Takola,"[19]

[17] *Bickmore Gall Cure* v. *Karns*, 134 F. 833; *Time, Inc.*, v. *Ultem*, 96 F. (2d) 164; *My-T Fine Corp.* v. *Samuels*, 69 F. (2d) 76; *Florence Mfg. Co.* v. *Dowd*, 178 F. 73; *Rice & Hutchins, Inc.*, v. *Vera Shoe Co.*, 290 F. 124; *Jose B. Lopez* v. *Jackson Brewing Co.*, 94 F. (2d) 964; *Hilson* v. *Foster*, 80 F. 896; *Fairbank* v. *Bell*, 77 F. 869; *Coca-Cola Co.* v. *Old Dominion Beverage Corp.*, 271 F. 600 (E.D. Va.) No. 39, Equity, 1922.

[18] *Cleo Syrup Corp.* v. *Coca-Cola Co.*, 139 F. (2d) 416; cert. den. 321 U.S. 781.

[19] *Coca-Cola Co.* v. *Old Dominion Beverage Corp.*, 271 F. 600.

"Polo-Kola," [20] "Gay-Ola," [21] "Chero-Cola," [22] "Apola Cola" and "Lola Kola." [23]

It is illogical to say, as the Courts below did, that the passing off was the spontaneous act of the dealers. Imitation of name, product, color scheme, script form of writing and slogan amounts to more than a subtle suggestion to dealers to pass off. It amounts, as was said by Mr. Justice Brandeis, to "putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product. That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition. And trade-marks which deceive the public are denied protection although members of the trade are not misled thereby." [24]

Mr. Justice Cardozo appropriately said that "the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance." [25]

In the present case the trial Court found: "It is possible that when a consumer orally ordered Polar Cola a bartender or waiter might understand the order to be Coca-Cola . . ." [26] Under this statement of fact, "Coca-Cola" would be a colorable imitation of "Polar Cola," except for the fact that "Coca-Cola" was first in the field. The trial Court then followed with its finding: "but it is

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[20] *Coca-Cola Co.* v. *Belinsky*, 57 F. Supp. 120.

[21] *Coca-Cola Co.* v. *Gay-Ola Co.*, 200 F. 720; cert. den. 229 U.S. 613.

[22] *Coca-Cola Co.* v. *Chero-Cola Co.*, 273 F. 755.

[23] *Dixi-Cola Laboratories, Inc.*, v. *Coca-Cola Co.*, 117 F. (2d) 352.

[24] *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494; *Warner & Co.* v. *Lilly & Co.*, 265 U.S. 526, 530.

[25] *Federal Trade Commission* v. *Algoma Co.*, 291 U.S. 67, 78.

[26] Finding 38 (e), 64 F. Supp. 980, 991.

unlikely that when a consumer ordered Coca-Cola a bartender or waiter acting in good faith would understand Polar Cola." Is this to say that "Coca-Cola" is a colorable imitation of "Polar Cola," but "Polar Cola" is not a colorable imitation of "Coca-Cola"? If, as this Court has said, the public is entitled to get what it chooses, it is entitled to get "Polar Cola" and not "Coca-Cola" when "Polar Cola" is ordered. And conversely, when it orders "Coca-Cola," it is entitled to get "Coca-Cola." If the names are so much alike that one is likely to be understood when the other is ordered, then it follows as an obvious corollary that confusion is likely and *one mark is a colorable imitation of the other.*

C. The Conflict of Cases.

The second question presented is whether a Court may nullify the protection granted a trade-mark registered under the Federal statutes by holding that "Polar Cola" [27] is not a colorable imitation of the registered trade-mark "Coca-Cola" when other Courts have held its phonetic equivalents "Apola Cola" [28] and "Polo-Kola" [29] to be colorable imitations of "Coca-Cola" and enjoined their use.

In the "Apola Cola" case the validity of the registered trade-mark "Coca-Cola" was challenged and the Circuit Court of Appeals found that "It is certainly beyond dispute that the word 'Coca-Cola' is the exclusive property of The Coca-Cola Company." [30]

In the "Polo-Kola" case the validity of the trade-mark "Coca-Cola" was conceded.

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[27] Generally pronounced "Pola Cola." See page 8, *supra.*

[28] *Dixi-Cola Laboratories, Inc.*, v. *Coca-Cola Co.*, 117 F. (2d) 352; 155 F. (2d) 59, 62.

[29] *Coca-Cola Co.* v. *Belinsky*, 57 F. Supp. 120.

[30] 117 F. (2d) 352, at page 354.

In this case, also, the validity of the trade-mark "Coca-Cola" is conceded.

The petition for certiorari is based on the conflict of decisions as to what constitutes a colorable imitation—and therefore infringement. The basic situation is the same as that presented in *Sanitary Refrigerator Co.* v. *Winters*, 280 U.S. 30.

In each of the three trade-mark cases referred to above, defendant's product imitated "Coca-Cola" in color, appearance and taste and passing off had occurred. In the "Apola Cola" case and the "Polo-Kola" case infringement was found and passing off was enjoined, but in the "Polar Cola" case all relief was denied. This conflict is comparable to that presented in *Fashion Guild* v. *Federal Trade Commission*, 312 U.S. 457, in which certiorari was granted because of the conflict resulting from decisions of the Courts of Appeals for the First and Second Circuits as to what constituted unfair competition.

The decisions of the Courts below in this case are likewise basically and fundamentally in conflict with the decision of the Eighth Circuit Court of Appeals holding "Cleo-Cola" to be a colorable imitation of and an infringement of "Coca-Cola."[31] In the "Cleo-Cola" case there was, as in this case, imitation of product in taste, appearance and color, a *progressive approximation* of petitioner's distinctive features brought about by successive changes in the display of the mark—first by changing the color scheme to red and white, then by changing the form of writing the mark to simulate the script form of writing "Coca-Cola." Passing off at bars and taverns was proved in the "Cleo-Cola" case, although the extent of such proof was considerably less than in the present case.

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[31] *Cleo Syrup Corp.* v. *Coca-Cola Co.*, 139 F. (2d) 416; cert. den. 321 U.S. 781.

The evidence in this case with regard to infringement and unfair competition is substantially the same as was before the Courts in the "Gay-Ola" case,[32] "Fletcher's Coca Cola" case,[33] "Taka-Kola" case,[34] "Chero-Cola" case,[35] "Apola Cola" and "Lola Kola" case,[36] "Cleo-Cola" case [37] and the "Polo-Kola" case.[38] In each of these cases the mark was held to be a colorable imitation of "Coca-Cola" and the passing off was enjoined. In the present case, on the basis of substantially the same evidence, except that the passing off was more flagrant and more intense, the Courts below held that "Polar Cola" was *not* a colorable imitation and the passing off was *not* enjoined.

It is urged that this presents a *conflict* which must be resolved by this Court in order that the purposes of the Federal trade-mark statutes may be realized.

D. Conclusion.

"Polar Cola," as a matter of law, is a colorable imitation of the registered trade-mark "Coca-Cola."

To hold otherwise, particularly in the light of all the *proved circumstances surrounding its use and the resulting passing off*, will reduce the protection of registered trade-marks to an ineffective theory and will create a precedent for Court sanction of confusion and deception of the public. Furthermore, it will encourage others to imitate with impunity.

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[32] 200 F. 720; cert. den. 229 U.S. 613.
[33] 215 F. 527.
[34] 271 F. 600; cert. den. 256 U.S. 703.
[35] 273 F. 755.
[36] 117 F. (2d) 352; 155 F. (2d) 59.
[37] 139 F. (2d) 416; cert. den. 321 U.S. 781.
[38] 57 F. Supp. 120.

To hold otherwise will result in irreconcilable conflict between the decision of the Court below and the decisions in other circuits, thereby bringing about uncertainty, instability and confusion.

Considering recent Congressional action on the subject of trade-marks under which the rights of registrants are *broadened*, it is submitted that the decision of the Court below is directly in conflict with the legislative intent evidenced by said Act.

It is respectfully urged that the petition for certiorari be granted.

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Supreme Court of the United States.

OCTOBER TERM, 1947.

No. 332.

THE COCA-COLA COMPANY, *Petitioner*,

v.

SNOW CREST BEVERAGES, INC., *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING PETITION FOR CERTIORARI.

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Supreme Court of the United States.

October Term, 1947.

No. 332.

THE COCA-COLA COMPANY, Petitioner,
v.
SNOW CREST BEVERAGES, INC., Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING PETITION FOR CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court appears on pages 13 to 32 of the Record and is reported in 64 Fed. Supp. 980. The opinion of the Circuit Court of Appeals appears on pages 494 to 504 of the Record and is reported in 162 F. (2d) 280.

JURISDICTION.

Federal jurisdiction rests upon 15 U.S.C. Sec. 97, and upon diversity of citizenship and amount in controversy. Jurisdiction of this court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C. Sec. 347 (a)), and on Act of July 5, 1946 (15 U.S.C. Sec. 1122).

STATEMENT OF THE CASE.

The Issues Presented by the Petition.

The petitioner sought to enjoin the use of Polar Cola because, as claimed, it had been used as an instrument of unfair competition and it is so like Coca-Cola as to infringe that registered mark.

The District Court found that there had been no unfair competition and that the mark does not infringe Coca-Cola, and accordingly dismissed the complaint. The Circuit Court of Appeals affirmed.

Certiorari is sought on the grounds that Polar Cola is in fact a colorable imitation, and that the contrary holding is in conflict with cases in other Circuits dealing with other marks.

Respondent submits that the petition should be denied for that there is no conflict with other cases, no novel point or issue of importance is presented and no basis for a reversal exists.

The Findings and the Facts.

The respondent's soft-drink bottling business is in two aspects: the one, sales to retail stores for resale in the unopened labelled package (R. 321, Q. 133; R. 322, Q. 151) and the other, sales to bars, taverns, hotels and the like, for use as a bar cola (R. 14, Fdg. 5). The District Court found no likelihood of confusion in the important retail store business, and that "even a purchaser of a Polar Cola bottle who was not alert could not reasonably assume that defendant's bottled goods came from the plaintiff" (R. 20, Fdg. 22). No contention to the contrary is made (R. 38, 290, Q. 35).

The bulk of the evidence to support the claim of infringement and unfair competition came from petitioner's

investigators, who gave orders in bars, taverns and restaurants in Boston.

The petitioner's contention was that this evidence showed confusion due to phonetic similarity, and that respondent's name, labelling and label changes showed unfair competition in this business.

Petitioner has relied substantially only on the alleged phonetic similarity (C.C.A. Op., R. 500) and now asserts that the test of infringement is "wholly phonetic" (Brief, p. 14).

1. Actually none of the evidence showed confusion due to phonetic similarity. The evidence did show clearly that the substitution which occurred was not due to confusion or phonetic or other likeness.

Petitioner's investigators went into 82 bars, taverns and the like in Boston. They found that when they ordered a mixed drink such as "whiskey and Coca-Cola" substitutions were made of any one of various bar colas, including Polar Cola (R. 23, Fdg. 30). These bar colas were up to 13 in number (R. 22, Fdg. 26). Polar Cola was used in 47 bars, other drinks in 35 bars.[1]

The experience in the 35 non-Polar Cola serving bars completely negatived any inference that the substitution was made because of phonetic similarity. Out of 200 orders in non-Polar Cola serving bars, Royal Crown was served 31 times, Castle Rock Beverages 28 times, Pepsi Cola 25 times, Coca-Cola 33 times, Walker's Beverages 9 times, Lime Cola 5 times, LaSalle Beverages 2 times, Epi-

[1] The investigators made repeat visits only to bars where Polar Cola was substituted (R. 303, X-Q. 116). The greater total of reported substitutions in the Polar Cola serving bars means only that there were many repeat visits to those bars. It does not signify any greater substitution in fact of Polar Cola for Coca-Cola than of the other named colas used in the bar trade in Boston, some of which have been litigated and found not to infringe and others of which bear no phonetic similarity whatsoever.

cure Club 2 times, Unidentified 66 times (R. 294, Q. 58; C.C.A. Op., R. 501; Dist. Ct. Op., R. 23, Fdg. 30).

There was evidence that there are many orders for mixed drinks in which a specific cola is not called for and apparently these are much the greater in number and the specific orders relatively few (R. 24, Fdg. 33 (b), R. 352).

The inescapable conclusion was that (in the words of the District Court), "When the bartender wanted to make a substitution, he could and did make it equally with any type of inexpensive cola drink, no matter how named or packaged" (R. 25, Fdg. 33 (f)).[2] The specific orders were fringe orders in a large open cola field.

The fact that, in a few instances, waiters, caught in a substitution agreed, by acquiescing in leading questions of the investigators, that the names sounded alike, was held to be without significance by both courts (R. 502; R. 32, Fdg. 38 (e)).

2. There was nothing in the evidence as to the name or the labelling which warranted or required a finding of unfair competition.

The petitioner now virtually accepts the unequivocal findings of both courts to this effect (R. 25, Fdg. 33 (f); R. 499) so far as concerns an intent of "directly confusing the public," but suggests that the alleged simulation was in order to make *dealers think* of substituting (Brief, p. 14).

---

[2] There was the further fact that in 31 and possibly 32 cases out of 33, when Coca-Cola alone was ordered—that is, without a strong drink with it—either Coca-Cola was served or an explanation given (or, in two cases, Royal Crown was served) (R. 135, 139, 141-142, 149, 189-190, 227-228, 261, 263, 270). Clearly waiters were not misunderstanding in any of the cases in which Coca-Cola was ordered. In *all* the mixed drink cases they were using a bar cola, whatever it was, and quite regardless of similarity of name.

There is no evidence whatever to support this novel contention.

The court found that respondent never suggested substitution (C.C.A. Op., R. 501) and that all that it did was to manufacture a like drink and sell it for less (C.C.A. Op., R. 502), "which it certainly was within its rights in doing" (*Idem*). Neither did the respondent fail to act in any respect in which action was required (R. 27-30, 504).

The name Polar had been used by respondent for soft drinks since 1929. The label changes and the descriptive adjectives spoken of were affirmatively shown to be not related to Coca-Cola or to thought of simulation.[3]

---

[3] In view of the repeated assertions of the petition that there was colorable imitation and "step by step" approach, the relevant facts are here briefly summarized:

Respondent had used the name Polar for soft drinks steadily since 1929 (R. 15, Fdg. 7). It first produced a cola in 1935, trying it first in its higher priced fresh fruit Snow Crest line as Sno-Kola, and then in both this line and its lower priced Polar Cub line. The lower priced line of carbonated beverages other than cola had a greater volume of sales than the fresh fruit line and the respondent found that the trade demanded the lower priced cola package. The Sno-Cola line brought in little business and was given up and the respondent has continued the Polar Cola sales (R. 15, Fdgs. 8, 9; R. 320, Qs. 119, 123, 127-128; R. 476, 357).

Respondent's earlier labels had a bear and arctic scene (R. 16, Fdg. 10). Later (1943) a label was used having a red background and the name in large white letters approaching script with a prominent picture of an owl and the slogan: "Get wise. Giant size." The name of the respondent as bottler also appeared (R. 16, Fdg. 11). At the time of the change respondent had had a notice from Great Bear Spring Company (R. 392, Q. 640) on the basis of which counsel advised that it could not hope to expand with the then label (Bear Cub) outside its then operated territory (R. 392, Q. 643). That was an element in the change to the new label (R. 392, Q. 644).

Petitioner speaks of the words "delicious" and "refreshing" as though used with other features and to suggest substitution (Brief, p. 2). Actually these words were used in the early period only (R. 16, Fdg. 10; Petr's. Brief, p. 9, statement 6) and only on the totally different bear labels (R. 16, Fdgs. 10 and 11).

ARGUMENT.

I.

There is No Conflict with the Cases in Other Circuits.

1. It has recently been established that the word cola is generic and may be used by anyone as a part of a trade mark.

Dixi-Cola Laboratories, Inc., v. *Coca-Cola Co.*, 117 F. (2d) 352 (C.C.A. 4th, 1941).

Coca-Cola Company of Canada, Ltd., v. *Pepsi-Cola Company of Canada, Ltd.* (British Privy Council), All Eng. Rep. 1942, vol. I, p. 615; 32 T.M. Rep. 313.

Coca-Cola Co. v. *Nehi Corp.*, 36 Atl. (2d) 156 (Del. 1944).

Cases prior to these, in which cola marks are enjoined, are subject to discount because of the claims made in them of the right to the "cola" part of the name.

2. Now that cola is generic and freely usable there is a materially different frame of reference for infringement cases in the cola field.

The applicable principle is stated in the Vapure-Vapex case.

Thomas Kerfoot & Co., Ltd., v. *Louis K. Liggett Co.*, 67 F. (2d) 214, 215 (C.C.A. 1st, 1933):

> "The question whether 'Vapure' is an infringement on 'Vapex', i.e., whether the two names are so similar in appearance and in sound that one is likely to be mistaken for the other by an ordinarily careful buyer, is to be determined, not merely by an inspection of the words, but by considering them in connection with other similar words in use in the same general field.

> . . . With so many trade-marks having the same basic syllable (Vap) already in use at the time of the plaintiff's registration in this country, it must be supposed that the public discriminated between them by the ending or combination in which 'Vap' was used."

3. The cases following the cola decisions are clearly distinguishable.

They all turn on the District Court's findings (Rules of Civil Procedure, Rule 52 (a)) and they are all cases in which findings of infringement have been sustained. None of them turns on phonetic equivalence. They are all cases in which acts of intentional unfair competition were found. Thus they each had the affirmative expert evidence of the wrongdoer, through his act of adopting the name with intent to copy, that the names were similar (*My-T Fine Corporation* v. *Samuels*, 69 F. (2d) 76, 77 (C.C.A. 2d, 1934)).

4. There is no conflict with the Apola Cola case (Petr's. Brief, p. 16) (*Dixi-Cola Laboratories, Inc.* v. *Coca-Cola Co.*, 117 F. (2d) 352 (C.C.A. 4th, 1941); *Coca-Cola Co.* v. *Dixi-Cola &c.*, 31 F. Supp. 835 (D.C. D. Md. 1940)). The decree in that case was virtually a consent decree as to this name. The opinion of the District Court says (p. 837): "However, at the trial, counsel for defendants abandoned any right to continue to use the name 'Apola Cola,' and there is little if any evidence respecting the use of the name 'Lola-Kola' or 'May-Cola'. . . ." The Circuit Court of Appeals (p. 353) stated that no defense was made as to Apola Cola and Lola-Kola. There is no discussion of phonetic likeness of these words to Coca-Cola.

Further, in that case there was found to be unfair competition, intent to pass off, and a conspiracy between defendants and their customers to palm off goods (117 F. (2d) 352, 360).

5. There is no conflict with the Pola Cola case (*Coca-Cola Co.* v. *Belinsky,* 57 F. Supp. 120). This case did not go beyond the District Court. The evidence showed that from the beginning the defendant intended to palm off his product. He was a former Coca-Cola employee acting with deliberate intention of deceit in adopting both color and name (p. 121). There is no discussion of phonetic likeness.

6. There is no conflict with the Cleo Cola case (*Cleo Syrup Corp.* v. *Coca-Cola Co.,* 139 F. (2d) 416; cert. den. 321 U.S. 781). Here again deliberate intent was found (p. 419). The court said: ". . . the deceptive similarity was deliberately brought about by the defendant." The court noted that the trial court's findings must prevail if not clearly wrong (417).

It does not follow, because Cleo or the other names (*supra*) in their context of overall appearance and use were infringing, that Polar in its context *must* be found to infringe.

7. The other cases referred to by the petitioner are pre-Dixi-Cola cases (Petr's. Brief, p. 18) and on any aspect are clearly distinguishable.[4]

8. In another post-Dixi-Cola case there was a two syllable first name and the use of "o" and "a" in that word, but no infringement was found.[5]

---

[4] Fletcher's Coca Cola is obviously enjoinable. In the Taka Cola case the court said it was deciding only that case and noted that it had found unfair competition (271 Fed. 600, 604 (C.C.A. 4th, 1921)). The Chero Cola case (273 Fed. 755 (C.C.A. D.C. 1921)) was an application to register a trade mark and many witnesses testified to actual confusion. In the Gay-Ola case (200 Fed. 720 (C.C.A. 6th, 1912)) there was blatant offering of the product for substitution, and cheating.

[5] Noteworthy also are the Pepsi Cola and Royal Crown cases.

Coca-Cola Company of Canada, Ltd., v. *Pepsi-Cola Co. of Canada, Ltd.* (British Privy Council), All Eng. Rep. 1942, vol. I,

Coca-Cola Co. v. *Carlisle Bottling Works*, 43 F. (2d) 119 (C.C.A. 6th, 130) (Roxa Cola held not to infringe. Plaintiff's acquiescence found).

9. There are numerous non-cola cases in which no infringement has been found, although the names are more similar than Polar Cola is to Coca Cola.[6]

II.

No Novel Question or Issue of Importance is Presented.

It is submitted that this is apparent on the facts and the cases.

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p. 615; 32 T.M. Rep. 313 (Pepsi Cola). The use of script in the name, red color in advertising, and like color and taste was emphasized but no infringement was found.

Coca-Cola Co. v. *Nehi Corporation* (Del. 1944) 36 Atl. (2d) 156, 165 (Royal Crown). Here the court found no objection even though aroma, taste and color were the same, and the words "delicious" and "refreshing" had been used.

[6] E.g.: *Goodall Worsted Co.* v. *Palm Knitting Co.*, 10 F. (2d) 1013 (App. D.C.) (Palm-Knit—Palm Beach). *Valvoline Oil Co.* v. *Havoline Oil Co.*, 211 Fed. 189 (Valvoline—Havoline). *California Cyanide Co.* v. *American Cyanamid Co.*, 40 F. (2d) 1013 (C.C.P.A.) (Citrofume—Citrus Dust). *Rytex Co.* v. *Ryan*, 126 F. (2d) 952 (C.C.A. 7) (Rytex—Rynart). *Parmele Pharmacal Co.* v. *Weiner*, 5 F. (2d) 750, 751 (C.C.A. 2) (Asepticons—Quinsepticons). *Purity Springs Water Co.* v. *Redwood Ice Delivery*, 203 Cal. 286, 263 Pac. 810 (Purity Spring Water—Puritan Water). *Yeasties Products* v. *General Mills*, 77 F. (2d) 523 (C.C.P.A.) (Yeasties—Wheaties). *Ansco Photoproducts, Inc.* v. *Eastman Kodak Co.*, 19 F. (2d) 720 (App. D.C.) (Speedex—Speedway). *Younghusband* v. *Kuriash Co.*, 94 F. (2d) 230 (C.C.P.A.) (Starlash—Kurlash).

III.

No Basis for Reversal Exists.

The issue is one of fact on exhibits and oral testimony.

Warner & Co. v. *Lilly & Co.*, 265 U.S. 526, 529.

The names are in fact different and context of use was material.

The failure to adduce any persuasive evidence of confusion based on likeness between the names was important and the court was entitled to give it weight.

Polar Cola apart from context of use and as a matter of law does not infringe Coca-Cola. The names are in fact *materially* different. The hard "c"'s of Coca-Cola are forceful and incisive. It is very unlikely, as the District Court pointed out, that when the word containing them (Coca-Cola) is pronounced anyone would think that "Polar Cola" was said (R. 32, Fdg. 38 (e)).[7]

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[7] The court said that it was possible that when a consumer orally ordered Polar Cola a bartender or waiter "might understand the order to be Coca-Cola." This is not, as the petitioner claims (Brief, p. 15), a conclusion which would require the finding that, if Polar Cola were first in the field, Coca-Cola would be a colorable imitation of it. The court was speaking of an order which was unlikely to be made, since on the evidence Polar Cola was little advertised and no consumer demand had been created (R. 22, Fdg. 27), and of an order given in a market in which, on the evidence, the likelihood of the customer saying "Coca-Cola" was substantial. There is in this situation a possibility that any compound cola name, the first part of which is composed of two syllables, coming into the field in which Coca-Cola is so emphatically dominant, both in advertising and sales, will be subject to the disability that the waiter may understand "the *order* to be Coca-Cola." (Emphasis added.) The court did not list or need to list the several reasons for this other than possible phonetic similarity, such as that the waiter might not hear or give attention to the first syllable and hence assume that the order was, as usual, "Coca-Cola."

All the three consonants of Polar are unlike those in Coca.

The names are different in connotation as well as in sound. Quite apparently Polar was adopted to suggest a very cold beverage, while Coca on the other hand was adopted to suggest a drink made from the leaves of the coca plant (*Dixi-Cola Laboratories, Inc.*, v. *Coca-Cola Co.*, 117 F. (2d) 352, 355 (C.C.A. 4th, 1941)).

CONCLUSION.

It is respectfully submitted that the petition should be denied.

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The court's adversion to this *possibility* (not a finding) is no basis for asserting that Polar Cola is a colorful imitation of Coca-Cola.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 332.

THE COCA COLA COMPANY, *Petitioner,*

v.

SNOWCREST BEVERAGES, INC., *Respondent.*

On Petition for Rehearing of the Petition for a Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

Motion for Leave to File and Memorandum in Support of Petition for Rehearing as Amicus Curiae.

NATIONAL ASSOCIATION OF BROADCASTERS,

By its attorneys:
DON PETTY,
BRYCE REA, JR.,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 332.

THE COCA COLA COMPANY, *Petitioner,*

v.

SNOWCREST BEVERAGES, INC., *Respondent.*

Motion for Leave to File as Amicus Curiae Memorandum in Support of Petition for Rehearing of Petition for Certiorari.

Comes now the National Association of Broadcasters and moves the Court for leave to file, as amicus curiae, a memorandum in support of the petition for rehearing of the petition for certiorari in the above-entitled matter.

This case presents a question of importance to the entire membership of this Association which consists of more than 1,200 radio broadcast licensees located in all parts of the United States.

Attached to this motion is the memorandum in question. The Petitioner and the Respondent have been notified of this motion by the mailing to each of them of a full copy of this motion and of the memorandum.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS,

By its attorneys:

DON PETTY,
BRYCE REA, JR.,
IVAR H. PETERSON.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 332.

THE COCA COLA COMPANY, *Petitioner,*

v.

SNOWCREST BEVERAGES, INC., *Respondent.*

Memorandum in Support of Petition for Rehearing of Petition for Certiorari.

The National Association of Broadcasters, as amicus curiae, respectfully prays that the petition of the Coca-Cola Company for rehearing of its petition for a writ of certiorari to the Circuit Court of Appeals of the First Circuit be granted to review the decision and judgment of that Court in the above-entitled case.

The decision of the trial court, as affirmed on appeal, presents a federal question of outstanding importance.

According to that decision, the use of a trade name phonetically similar to a protected trade name will not be enjoined in the absence of proof by the plaintiff that the phonetic similarity has *actually caused* confusion on the part of the public in specific instances. This is contrary to the general rule which the court below itself stated as follows: ". . . the legal test of trademark infringement is the same as the legal test of unfair competition and basi-

cally that test is the *likelihood* of consumer confusion as to the source of the goods."[1]

In advertising in aural radio broadcasting, the value of a trade name depends entirely upon its distinctive sound since visual representation, of significance in advertising in newspapers, periodicals, signs, etc., is impossible.

The value of the exclusive right to the use of a trade mark or trade name is that through the expenditure of time, effort and money by its owner, it becomes the means of identifying the commodity with which it is associated in the minds of consumers. This identification is created almost entirely by advertising, and much of the advertising reaches consumers through their ears alone. This is illustrated by the fact that in the year 1946 advertisers spent some $424,000,000[2] in aural radio broadcasting, most of it for the purpose of familiarizing the public with their exclusive trade marks and trade names.

It follows that to refuse to protect the distinctive sound of a trade mark or trade name is to deprive its holder of the very essence of his property, namely, his exclusive right to its use, thereby impairing, and in many cases, destroying, its value.

To refuse to extend the same degree of protection to representation by sound as to representation by sight is to place radio broadcasting, as an advertising medium, at a serious, unfair competitive disadvantage with other media.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS,

By its attorneys:

DON PETTY,

BRYCE REA, JR.,

IVAR H. PETERSON.

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[1] 162 F. (2d) 280, 283 (italics supplied).

[2] "An Economic Study of Standard Broadcasting", Report of the Federal Communications Commission issued October 31, 1947, Table A-1, p. 99.

IN THE

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OCTOBER TERM, 1947.

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THE COCA-COLA COMPANY, *Petitioner,*

v.

SNOW CREST BEVERAGES, INC., *Respondent.*

On Petition for a Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

PRELIMINARY STATEMENT.

The petitioner in the above-entitled cause requests this Honorable Court, pursuant to Rule 33 of the Revised Rules of this Court, to grant a rehearing on the petition for certiorari, and, upon reconsideration, to grant the petition.

In its original petition for certiorari, which was denied, petitioner urged as a principal ground for granting the writ that the decision of the court below was in conflict with decisions of federal courts in other circuits. We will not repeat our argument in support of this ground for certiorari since it is fully covered in our original petition. We believe that a substantial conflict exists and urge reconsideration on that ground.

In this petition for rehearing we wish to present an alternative ground for certiorari which we submit is a compelling reason for granting the writ. That ground which we now urge is that if this Court does not see a substantial conflict of federal decisions, nevertheless the court below has decided an important question of federal law which has not been, but should be, decided by this Court.

THE DECISION APPEALED FROM.

The question decided by the court below is of tremendous significance to all business concerns advertising a distinctive product on a nationwide scale. It is of equal importance to the agencies and instrumentalities through which they advertise. The lower court has ruled that a deliberate phonetic imitation of a widely advertised trademark could not be enjoined, where the imitator took the precaution of using a different visual design, in the absence of affirmative proof that particular customers in particular markets have been positively misled.

After pointing out in its opinion that the trademarks of the parties were differently designed, the court went on to say (162 F. (2d) 280, 284):

> "But the plaintiff's contention is not so much that its and the defendant's names in their respective settings *look alike* as that when spoken they *sound alike*. It says that the words 'Polar Cola' and 'Coca-Cola', when spoken in bars or taverns, which are frequently noisy places and where it and the defendant principally if not exclusively meet in competition, sound so similar as to cause consumer confusion. And in addition it says, and

stresses, that the similarity in sound between the names is so marked as not only to permit but also actively to encourage the passing off of the defendant's product on orders for the plaintiff's. Thus the similarity in sound between the names is urged in support of both the ground of trade-mark infringement and the ground of unfair competition. Since the same facts are said to support both grounds and since the test of both grounds is the same, we can dispose of two phases of the case on one consideration of the question of the verbal similarity of the names." (Emphasis supplied.)

The court then considered the evidence of the sale of Polar Cola in bars. It concluded "that relatively very few opportunities ever arise for passing off the defendant's drink in bars and taverns on specific orders for the drink manufactured by the plaintiff." For this reason, it affirmed a decision denying plaintiff injunctive relief against a phonetic imitation of its trademark name which was deliberately chosen by respondent with knowledge of petitioner's mark.

THE QUESTION PRESENTED.

The question presented by the decision below may be expressed by a hypothetical case. Suppose that the owner of a registered trademark name by the expenditure of tremendous sums in advertising in the press and over the radio creates a market for a distinctive product, which he sells under that name. Suppose as a result of that investment he has obtained a nationwide public identification of his trademark name with his product. In that situation, assume that a succession of competitors deliberately use phonetic imitations of the advertised trademark name, the aggregate effect of which is to dilute, impair and perhaps destroy the value of the trademark name as a distinctive designation for the product. Is the trademark owner deprived of any remedy against any single one of these imitators on the ground that the consumer confusion in each single instance is of slight consequence however damaging the aggregate effect might be expected to be?

Or, in other words, in a day of increasing reliance on the radio for advertising, are trademark names, as a matter of law, to be protected against visual imitations, but not against phonetic simulations?

REASONS FOR REHEARING AND GRANTING THE WRIT.

The court below answered the above question in the affirmative. It refused to grant injunctive relief against a deliberate phonetic imitation of petitioner's trademark. Its ground for refusal was that in the particular situation before the court, i.e., in the bars of Boston where the defendant happened to be using the imitative name at the time of the decision, there was little chance of consumer confusion. It declined to consider the future probabilities of continued imitation.[1] It ignored the ultimate consequence of its decision as a license permitting thousands of other imitators to dilute and destroy the distinctive value of the trademark name by constant and repeated phonetic imitations.

Under the lower court's decision, the opportunity to preserve a clearly identifiable trademark name is certainly impaired and may be destroyed in what is today probably the most important of all advertising media—the radio. In this field, the visual distinguishability of trademarks, which the lower court strongly emphasized, is meaningless. Phonetics are what count. And the effect of phonetic imitations, which the lower court's opinion invites, in diluting, impairing and destroying distinctive trademarks is incalculable. Specifically there are here in issue two names which are especially difficult to distinguish phonetically.[2]

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[1] Cf. *Time, Inc.* v. *Ultem Publications*, 96 F. (2d) 164, 165 (CCA 2d, 1938).

[2] This, in fact, was admitted by the trial Court when it found: "It is possible that when a consumer orally ordered Polar Cola a bartender or waiter might understand the order to be Coca-Cola . . ." (64 F. Supp. 980, 991)

The first two syllables of each name contain identical vowel sounds. The last two syllables are wholly identical. The letter "r" in Polar[3] is silent in large areas of this country. Furthermore, precise enunciation of consonants over the radio would scarcely be expected from a deliberate imitator.

The effect of the decision is to create in the growing field of aural advertising an opportunity for confusion which does not exist in visual advertising. To avail himself of that opportunity the imitator of the sound of the trademark name first makes the visual mark distinctive. He then puts the phonetic imitation on the air where visual identification is not possible. Thus, radio advertising is placed under a handicap. The essence of the American advertising art over the radio is a trademark name readily distinguishable *in sound*. The decision below seriously jeopardizes this new American art. If "Polar Cola" is all right, why not "Floor-line" shoes; "Stine-play" pianos; Hillsberry" flour, etc.

The threat is not minimized by the fact that in this case Polar Cola is not now advertising on the radio. The record shows it has done so in the past. It may be expected to do so again in the future. Once the use of the phonetic imitation of a trademark name is approved no sensible line of distinction can be drawn between using that name in a retail store and over the radio. Nor is the lower court's test of the insignificant amount of confusion in the limited area involved in this case helpful. The effect of one advertisement by one imitative product on one radio station may indeed be slight. But the aggregate effect of repeated imitations by numerous imitators over many stations is bound in the long run to be destructive. It is no answer to say that petitioner is unduly alarmed,—that its position is so secure that the consequences which it fears will not happen. No one is in the position to say that the constant alertness

[3] Generally pronounced "Pola Cola." See Webster's New International Dictionary (2d ed.), p. L, § 212, of the section "A Guide to Pronunciation."

against invasions of their trademark names practiced by Coca-Cola and all companies in a similar situation is not vital to successful merchandising of their products.

Until the decision in this case, it was a well established legal principle that phonetic imitations of trademarks were no less enjoinable than actual counterfeits.[4] Now it has in effect been ruled to the contrary. If that is sound law, this court is the proper tribunal to declare it. We submit that regardless of whether this decision is in direct conflict with other federal decisions, it is at the very least a radical departure from previously enunciated principles of trademark law, exemplified by the following declaration of the Second Circuit (*Time, Inc.* v. *Ultem Publications,* 96 F. (2d) 164, 165 (1938)):

> "It is probably too soon to learn whether any actual confusion will result, certainly the plaintiff has not so proved that it has yet done so; but the similarity could scarcely have been accidental in origin, and the defendant refused to make any change when challenged at the very outset. *Imitation may supply the place of proof; the plagiarist's motive can only be some advantage to himself, which is most likely to be, in part at any rate, the likelihood that his wares will be taken as first-comer's.*" (Emphasis supplied)

Moreover, the principles involved have a broad economic significance. The Coca-Cola Company, as this Court knows, is a worldwide organization marketing a soft drink which has been widely imitated. As the court said in its opinion, "The tens of millions of dollars it has spent over the years in advertising its product under the name 'Coca-Cola' have created an enormous public demand for the beverage." In other words, the present market for Coca-Cola is not the result of a natural demand as in the case of a necessity.

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[4] *Cleo Syrup Corp.* v. *The Coca-Cola Company,* 139 F. (2d) 416 (Cleo Cola and Coca-Cola), cert. denied 321 U. S. 781; *J. L. Prescott Co.* v. *Procter & Gamble,* 102 F. (2d) 773, cert. denied 308 U. S. 557 (Oxol and Oxydol); *Brown-Forman Distilling Co.* v. *Bloch,* 99 F. (2d) 708 (Old Foster and Old Forester).

It was the result of years of education of the public to demand the kind of a drink which The Coca-Cola Company sells. Without the original Coca-Cola advertising of this name, the present market would not exist; furthermore, without advertising, the demand for this kind of product would soon be seriously impaired. The same is true of many other products of American industry.

Of course, the markets originated by advertisers are not the exclusive domain of those who created them. By selling similar goods or even imitations others may profit from the demand which a particular advertiser has developed. Petitioner recognizes this to be legitimate. But the impetus of American business will be gone if the pioneer advertiser is not afforded at least the minimum protection of preventing his distinctive trademark name from being engulfed in a rising tide of similar sounding names.

In fact, the creation of widespread consumer demand for new types of merchandise by intensive and far-flung advertising of brand names is the touchstone of the modern American industrial system. That is how American merchandisers rapidly reach the mass markets which alone make possible the mass production methods whereby new and better products are brought within the means of average income groups. There are many responsible authorities who say that the development of the advertising art is the key to the American workman's unrivalled standard of living.

The principle involved is of the utmost significance. In a fundamental sense it endangers the whole modern American merchandising system and the benefits with which, your petitioner believes, that system has endowed the American public. More specifically, the decision below threatens to depreciate the value of established trademarks and to retard the introduction to the market of new products, which require intensive advertising to gain public acceptance. All trademark owners are adversely affected by the decision. Likewise, the entire radio industry is vitally affected. And,

finally, the consuming public is exposed to all sorts of product confusion.

Thus the question presented by this case, whether trademarks enjoy any protection against phonetic imitations, far transcends the welfare of The Coca-Cola Company. Rather it is of basic importance in relation to the American economic system—from the standpoint both of industry and of the consuming public. And the law on the question as declared by the lower courts has, at the very least, become uncertain and confused as a result of the decision below.

It is accordingly respectfully submitted that the Court should rehear our petition for certiorari and upon such rehearing should issue the writ.

Respectfully submitted,

POPE F. BROCK,
THURMAN ARNOLD,
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ARNOLD, FORTAS & PORTER,
HERRICK, SMITH, DONALD, FARLEY & KETCHUM,
SPALDING, SIBLEY, TROUTMAN & KELLEY,
DAPHNE ROBERT,
Of Counsel.

I, counsel for the petitioner herein, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

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THURMOND ARNOLD,
Counsel for Petitioner.

November 21, 1947.